Office Supreme Court, U. S.
FILED
MAR 29 1922
WM. R. STANSBURY
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IN THE

SUPREME COURT OF THE UNITED STATES.

No. 797. 295

INTERNATIONAL LIFE INSURANCE COMPANY,
PETITIONER AND PLAINTIFF IN ERROR,

vs.

ADRIAN F. SHERMAN, RESPONDENT AND DEFENDANT IN ERROR.

REPLY BRIEF OF PETITIONER ON PETITION FOR WRIT OF CERTIORARI.

CHARLES G. REVELLE,
ARMWELL L. COOPER,
Attorneys for Petitioner.

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The proceeding on petition for a writ of certiorari is docketed under the same number as the case now here on writ of error, and it is respectfully suggested that the controversy, both as to remedy and on the merits, be submitted at one time, on complete briefs and oral argument, so that the court, with full information, may determine which is the proper remedy. The desirability and propriety of this course is shown by one of the points made by respondent, viz:

(1) That the State Court found, as a fact, that the Federal Court did not have jurisdiction of respondent's assignors (though it concededly did of him) and that this court will not review a finding on the facts. He overlooks that the question of jurisdiction of the parties is a law question and not a mere question of fact. At the most it is a mixed question of law and fact. The question is whether the Federal Court had jurisdiction under the facts disclosed by its record. That is a question of law. Primarily it was for the Federal Court to determine its jurisdiction preliminary to taking final action in the case. This it did, in favor of its jurisdiction. The State Court, upon a review of the record, held to the contrary, although it ignored, in its decision, the due and orderly proceedings before the special master. As stated, the decree and judgment of the Federal Court was, at all times, pleaded and urged as a bar. It undoubtedly furnishes a complete defense if that court had the right to render the judgment it did render. This court will *"for itself"* determine the question of the jurisdiction of the Federal Court from the record of that court, and, if this court finds in favor of such jurisdiction, it will follow that the judgment of the State Court must be set aside. Clearly a right or immunity is claimed by petitioners, which should be examined and considered by this court after full and careful presentation at the hearing on the merits.

(2) Respondent submits an extract from the merger contract between the Great Western Life Insurance Company and petitioner. He omitted to quote the following part of the contract (R., 131):

> "or, if said International Life Insurance Company shall prefer, it may elect to continue said annuity and investment certificates in full form and effect, according to the terms thereof, except that the same shall apply, * * *."

Here follows substantial modifications of the terms of the certificates, and then,

> "Nothing herein shall be construed as a waiver of any defense which either The Great Western Life Insurance Company or the International Life Insurance Company may have against the validity of or liability upon said certificates, nor shall it be construed to take away any right or remedy of any holder of any such certificate against the International Life Insurance Company."

This action is not on the contract nor in accordance therewith. It is in assumpsit for money had and received to recover the price paid for the certificates, after rescission. The validity of the certificates is not involved nor material. The action could as well be maintained if it were asserted and held that the certificates were *ultra vires* as not being "annuities" and involving no element of the expectancy or duration of life. The judgment is a general money judgment, enforceable by general execution and capable of being satisfied only by the payment of money. None of the alternatives offered by the contract are available to petitioner. The contract has no place in this controversy, except, of course, to put petitioner in the shoes of the Great Western Life Insurance Company. Hence there is nothing in the opinion of the Supreme Court of Missouri touching on this

point. A case, no doubt, could have been brought on involving this contract; but none such has been instituted.

(3) The issue is: Shall the decision of the Federal Court stand? If so, respondent has no case. If not, petitioner must pay the judgment.

Respectfully submitted,

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ARMWELL L. COOPER,
Attorneys for Petitioner.